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September 10, 2008

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 7, 2008

Case Number: TSO-0625

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> For the reasons set forth below, I conclude that the individual's security clearance should be restored.

## **I. BACKGROUND**

The individual's employer, a Department of Energy (DOE) contractor, requested an upgraded security clearance for the individual. As a part of this process, the individual completed and submitted a Questionnaire for National Security Positions (QNSP) on October 22, 2007, and was interviewed by a Personnel Security Specialist on December 19, 2007.

After reviewing all of the information in the individual's personnel security file, including the QNSP and the transcript of the Personnel Security Interview (PSI), the local security office determined that derogatory information existed that cast into doubt the individual's eligibility for a security clearance. The manager of the local security office informed the individual of this determination in a letter that set forth in detail the DOE's security concerns and the reasons for

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<sup>1</sup>An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that she was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning her eligibility for access authorization.

The individual requested a hearing on this matter. The local security office forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer. The DOE introduced eight exhibits into the record of this proceeding. The individual introduced three exhibits into the record and presented the testimony of five witnesses, in addition to testifying herself.

## **II. THE NOTIFICATION LETTER**

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to criteria (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (k) pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.)" except as prescribed or administered by a physician or otherwise authorized by federal law. As support for this criterion, the Letter cites the QNSP, on which the individual admitted that she used marijuana on one occasion in April 2007, while holding a security clearance. The Letter also refers to the PSI, during which the individual explained that this usage occurred when she ate a piece of cake that she knew contained marijuana, while on vacation in Jamaica. PSI at 43-50.

Pursuant to criterion (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [she] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [she] may be subject to pressure, coercion, exploitation or duress which may cause [her] to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). Under this criterion, the Letter states that on August 2, 1998, the individual signed a DOE Security Acknowledgment certifying that she understood that any involvement with illegal drugs could result in the loss of her clearance. Nevertheless, she admitted to using marijuana in April 2007.

## **III. REGULATORY STANDARDS**

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding her conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

## **IV. FINDINGS OF FACT AND ANALYSIS**

### **A. The DOE’s Security Concerns**

At the hearing, the individual essentially admitted the allegations in the Notification Letter. These allegations adequately support the DOE’s invocation of criteria (k) and (l), and they raise significant security concerns.

Use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, both because such usage may impair judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. An unwillingness to comply with security guidelines and other rules and regulations casts doubt upon an individual’s ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H.*

### **B. Mitigating Information**

At the hearing, the individual attempted to show, through her own testimony and that of a co-worker, a supervisor, her boyfriend, her mother, and her psychologist, that the incident referred to in the Notification Letter is the only time that she has ever used illegal drugs, and that she is an honest person who can be relied upon to obey the law and abide by security guidelines in the future.

The individual testified that she began working for her current employer in 1998, and that she was granted access authorization shortly thereafter. Hearing Transcript (Tr.) at 8. It is this authorization that was in effect at the time of the individual’s marijuana usage in April 2007. Subsequent to this usage, the individual’s employer applied for an upgraded DOE security clearance on the individual’s behalf. As a part of this process, the individual completed and submitted the October 2007 QNSP to the DOE, and it was on this Questionnaire that the individual admitted to having used marijuana. Tr. at 9, DOE Exhibit (Ex.) 4. The individual then described the sequence of events that led up to this usage.

She said that the trip to Jamaica was supposed to take eight hours, but because of cancellations and delays, it took approximately three days. Tr. at 12. The individual spent the first night in a

city near her job site, to which she had driven after work one evening to board an airplane. She spent the second night in Miami, Florida, and she

flew out of Miami . . . very early before sunup, and so we landed [in Jamaica] fairly early in the morning. But it's a very small airport, so it took awhile to get luggage, and then we rented a car, which took several hours to find somebody to even get the car. And then we had to drive half way across the island from there. So, it took quite a while to actually get to our resort. We didn't arrive . . . until the sun had gone down.

Tr. at 13. By the time she reached her resort, she had had "several snacks," but had not "had an actual meal in a few days," and was "very hungry." She went on to testify that when she and her three friends got to the resort, "there was a restaurant there on the beach," that

had a small menu. They had curried goat and a pizza, so we ordered each of those . . . . And that was new for me . . . . And then the pizza was a dough with curried goat on it. And I never personally had goat before, and I don't think I will again. It was not very tasty, very tough. So we tried those. We ate parts of them. There were four of us basically that ate a personal pizza and then a bowl of some goat. And I don't know who ordered a piece of chocolate cake from our waiter there.

Tr. at 14-15. One of the individual's friends told her that the cake had marijuana in it. Tr. at 15. The individual explained that "the pizza is gone, the curried goat is gone, there is a slice of chocolate cake," and she was still "very hungry." So, she "broke off a piece and tried it." Tr. at 15-17. She indicated that the piece that she consumed was approximately three square inches, enough to be eaten in "one or two" bites. Tr. at 21. She "didn't like it" because it "really did not taste like chocolate in any way." Shortly thereafter, she began to feel "very tired," and she went to bed. Tr. at 15-16.

She added that when she ate the cake, she was not thinking about her security clearance or about the security acknowledgment that she had signed nine years earlier. In fact, the individual did not recall having signed the acknowledgment until the initiation of this proceeding. Tr. at 17. Instead, she

was thinking safety more than anything. I was thinking – I was sitting with my . . . friends at my hotel and there was nobody else. And I was thinking that I was starving. That probably weighed more heavily on my mind that [*sic*] anything else, just, I'm very hungry.

*Id.* The individual's testimony also indicated that a subtle form of peer pressure may have come into play. "I wasn't ever pushed or pressured to try it," she said.

Everyone was trying it. Everyone was eating cake. . . . it was just there. And probably more than anything, when you're sitting and everyone is eating and talking, and everyone is sharing off of one plate, . . . the thought of what is on the plate seems not as strong, everybody is just reaching over and taking, and it's there, and I reached over and took as well.

Tr. at 20-21. She added, however, that she did not go to Jamaica to try marijuana, and that she had been offered the drug “constantly” during her stay in Jamaica and repeatedly during her years in the United States, and had declined to use marijuana on each occasion. Tr. at 16, 19. She further explained that these refusals were because she “never thought to try it or had a desire,” Tr. at 19, and that, with respect to her opportunities to use the drug in the United States, “the fact that it was illegal weighed very heavily in my decisions.” Tr. at 31. The incident in Jamaica was her only usage of marijuana, Tr. at 9, and the individual concluded by testifying that she does not intend to use illegal drugs in the future. “It’s never been a part of my life, and I don’t want it to be a part of my life,” she said. “I never have.” Tr. at 43.

The individual’s psychologist testified about his assessment of the individual. He evaluated the individual on May 22, 2008. This evaluation consisted of an interview, a review of the DOE’s exhibits in this case, and the administration of a battery of psychological tests. Individual’s psychologist’s report at 1, Individual’s Exhibit 3. At the hearing, he indicated that he was unable to diagnose the individual as suffering from a substance use disorder or any other disorder that would adversely affect her eligibility for a security clearance. Tr. at 102-103.

The individual’s co-worker and supervisor both testified that the individual is very respectful of, and compliant with, safety and security rules and procedures. Tr. at 50, 59. The supervisor added that the individual is a very honest person. Tr. at 63. The individual’s honesty was also attested to by the individual’s boyfriend and mother. Tr. at 72, 88. The boyfriend added that the individual does not use illegal drugs, and is very reliable and trustworthy. Tr. at 72. The individual’s mother stated that she is unaware of any other instances of illegal drug use by the individual, and that she has, in fact, expressed negative views about such use. Tr. at 86. She concluded that her daughter has never been “in trouble with the law” before. Tr. at 85.

### **C. Analysis**

After reviewing this testimony and the other evidence of record in this matter, I find that the individual has adequately addressed the DOE’s security concerns under criteria (k) and (l). In reaching this conclusion, I am aware that important aspects of her testimony, specifically the events surrounding her use of marijuana in Jamaica in April 2007, are not corroborated by independent evidence. However, the individual has been open and forthcoming about her marijuana use throughout this proceeding, and I found her testimony at the hearing to be particularly credible. As an initial matter, it is quite possible that the DOE would never have learned about the April 2007 usage had the individual not admitted that usage on her QNSP. I think it unlikely that the individual would make such an admission, knowing that it would have adverse consequences, Tr. at 36, and then intentionally provide false or misleading information under oath at the hearing. Moreover, I observed no hesitation or other evidence of deception in her demeanor. For the reasons set forth below, I find that the DOE’s security concerns have been mitigated by the testimonial and documentary evidence presented by the individual.

#### **1. Criterion (k)**

Several factors lead me to conclude that no valid security concerns under this criterion remain with regard to the individual’s eligibility for access authorization. First, there is no indication in the record that the individual has ever been diagnosed as suffering from a substance use disorder.

In fact, the individual's psychologist found insufficient evidence of any disorder to support such a diagnosis.

Second, the record reflects a single usage by the individual of a very small amount of marijuana. The individual's testimony that the incident in Jamaica was her only usage of the drug is supported by the testimony of her mother and boyfriend, and by the negative results of a November 2007 drug screening administered by her employer. DOE Ex. 6. The amount of marijuana consumed by the individual was only that contained in approximately three square inches of chocolate cake, or enough for "one or two bites." Tr. at 21.

In addition, as of the date of the hearing, the individual had abstained from marijuana usage for approximately 15 months. This period of abstention lends credence to the individual's statement that she does not intend to use illegal drugs again.

Finally, the individual's sole usage happened under such unusual circumstances that I believe it to be very unlikely that the individual will use the drug again. The usage occurred after a trip to Jamaica that had been lengthened to three days by flight cancellations and delays. During this arduous journey, the individual ate several snacks, but no full meals. Upon arriving at her resort in Jamaica with her friends, the individual was tired and very hungry, and they proceeded to a restaurant on the beach where the only entrees available were curried goat and pizza topped with curried goat. After finding these items to be not to her liking, the individual broke off a small piece of chocolate cake that she had been told contained marijuana, and ate it. I believe that the individual's hunger, fatigue, and presence in an environment that was accepting of marijuana usage to the point where a customer could apparently order food containing the drug, led to her decision to eat the cake. These circumstances are unlikely to be repeated. For these reasons, I find that the individual has adequately addressed the DOE's concerns under criterion (k).

## **2. Criterion (l)**

I reach a similar conclusion with regard to the security concerns under criterion (l), because the record in this matter indicates that the individual's April 2007 marijuana usage was an aberration, and that she is generally a conscientious and law-abiding person who takes security requirements seriously. In addition to the evidence discussed above, that the usage was an isolated incident, the record is devoid of any evidence of other security violations, or any illegal activity. Moreover, the individual's mother and boyfriend testified as to her law-abiding nature, and the supervisor and co-worker indicated that she was very respectful of, and compliant with, security requirements and procedures.

The importance that the individual attributes to security requirements is reflected in the honesty with which she answered the questions on the QNSP about her marijuana usage. When asked during the hearing whether she now regretted that honesty, she replied, "No," explaining that

I don't think I would have felt comfortable with myself, and I think it would have always gnawed at me had I just gone forth and gotten my Q without ever being truthful. I'd much rather go through the pain of being honest and fully disclosing everything.

Tr. at 28. The individual's psychologist concluded that she is "essentially unable by character" to be dishonest or less than fully candid with the DOE, "fully understanding that there would undoubtedly be consequences" for such candor. Tr. at 102.

Finally, I conclude that this administrative review proceeding has caused the individual to approach compliance with security requirements with an increased sense of importance. The individual testified that she is now

hypersensitive to security. The project that I work on is a very classified project, and I ask probably about five times every time I meet with anybody, "Are you sure I can see this? Are you sure this is okay?" And I work very hard, and I will continue to, and I will continue to really watch more closely what I am doing, my actions.

Tr. at 25. The individual's psychologist testified that this proceeding has been a very "difficult situation for her," one that has caused her to experience "self-criticism and poor self-regard." He continued that these negative attitudes "are probably promoting a sense of personal dissatisfaction which can range from mild depression to frank self-disgust, or even self-loathing. Her view of herself is generating emotional pain . . . ." Accordingly, he indicated that a repeat of the individual's behavior was unlikely. Tr. at 104. I agree, and given these factors, I conclude that the chances of the individual knowingly violating security requirements in the future are remote. The individual has adequately addressed the DOE's security concerns under criterion (I).

## **V. CONCLUSION**

For all of the foregoing reasons, I find that the individual has successfully mitigated the security concerns set forth in the Notification Letter, and I conclude that she has demonstrated that restoring her access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's security clearance should be restored. The Office of Security may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer  
Hearing Officer  
Office of Hearings and Appeals

Date: September 10, 2008